

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

EVINE BATTLE,

v.

Petitioner,

Case No. 2:19-cv-00453-GMN-DJA

ORDER

BRIAN WILLIAMS, et al.,

Respondents.

Before the court for a decision on the merits is a petition for a writ of habeas corpus filed by Evine Battle. ECF No. 7. For reasons that follow, the petition will be denied.

I. BACKGROUND¹

In May 2015, a jury sitting in the Eighth Judicial District Court for Clark County, Nevada, found Battle guilty of burglary while in possession of a deadly weapon, first degree kidnapping with use of a deadly weapon, robbery with use of a deadly weapon, and carrying concealed firearm or other deadly weapon.² The Nevada Supreme Court recounted the facts of his case as follows:

A GameStop store was robbed and an employee, Michelle Tyler, was restrained in the store's bathroom. Immediately after the incident, Tyler told police she would be unable to identify the culprit. Three days

¹ This background is derived from exhibits filed at ECF Nos. 13-17 and from this court's own docket.

² The jury acquitted Battle on two counts related to an alleged robbery of a 7-Eleven.

1 later, appellant Evine Battle was apprehended at a Jack in the Box
2 restaurant after acting suspiciously. Battle was dressed similarly to the
3 individual in the GameStop incident, and police found a concealed firearm
4 in his sweatshirt. Four days after the GameStop incident, Tyler was shown
5 a photo lineup and identified Battle as the culprit, although Tyler noted that
6 she was not 100 percent sure about the identification.

7 ECF No. 16-6 at 2.

8 The state district court sentenced Battle to an aggregate term of 360 months in prison
9 with the possibility of parole after 120 months. A judgment of conviction was entered in
10 August 2015.

11 Battle appealed his judgment of conviction arguing that insufficient evidence was
12 presented at trial to convict him on the three charges related to the GameStop incident
13 and that his venire was not composed of a fair cross-section of Clark County because
14 African Americans were underrepresented. The Nevada Supreme Court rejected those
15 arguments and affirmed Battle's convictions.

16 In August 2017, Battle filed a pro se petition for writ of habeas corpus with the
17 state district court. In his state petition, he raised claims of ineffective assistance of trial
18 counsel and appellate counsel. The state district court denied relief. On appeal, Battle
19 raised additional claims of ineffective assistance of counsel. The Nevada Court of
20 Appeals affirmed the state district court's order denying habeas relief in January 2019.

21 Battle initiated this proceeding on March 12, 2019. Respondents filed an answer
22 to the petition, in response to which Battle filed a reply. The court now addresses
23 petitioner's four grounds for relief on the merits.

24 II. STANDARDS OF REVIEW

25 This action is governed by the Antiterrorism and Effective Death Penalty Act
26 (AEDPA). 28 U.S.C. § 2254(d) sets forth the standard of review under AEDPA:

27 An application for a writ of habeas corpus on behalf of a person in
28 custody pursuant to the judgment of a State court shall not be granted with
respect to any claim that was adjudicated on the merits in State court
proceedings unless the adjudication of the claim –

1 (1) resulted in a decision that was contrary to, or involved an
2 unreasonable application of, clearly established Federal law, as
3 determined by the Supreme Court of the United States; or

4 (2) resulted in a decision that was based on an unreasonable
5 determination of the facts in light of the evidence presented in the State
6 court proceeding.

7 A decision of a state court is "contrary to" clearly established federal law if the
8 state court arrives at a conclusion opposite that reached by the Supreme Court on a
9 question of law or if the state court decides a case differently than the Supreme Court
10 has on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405-
11 06 (2000). An "unreasonable application" occurs when "a state-court decision
12 unreasonably applies the law of [the Supreme Court] to the facts of a prisoner's case."
13 *Id.* at 409. "[A] federal habeas court may not "issue the writ simply because that court
14 concludes in its independent judgment that the relevant state-court decision applied
15 clearly established federal law erroneously or incorrectly." *Id.* at 411.

16 The Supreme Court has explained that "[a] federal court's collateral review of a
17 state-court decision must be consistent with the respect due state courts in our federal
18 system." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). The "AEDPA thus imposes a
19 'highly deferential standard for evaluating state-court rulings,' and 'demands that state-
20 court decisions be given the benefit of the doubt.'" *Renico v. Lett*, 559 U.S. 766, 773
21 (2010) (quoting *Lindh v. Murphy*, 521 U.S. 320, 333, n. 7 (1997); *Woodford v. Viscotti*,
22 537 U.S. 19, 24 (2002) (per curiam)). "A state court's determination that a claim lacks
23 merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on
24 the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101
25 (2011) (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). The Supreme Court
26 has emphasized "that even a strong case for relief does not mean the state court's
27 contrary conclusion was unreasonable." *Id.* (citing *Lockyer v. Andrade*, 538 U.S. 63, 75
28 (2003)); see also *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (describing the AEDPA
 standard as "a difficult to meet and highly deferential standard for evaluating state-court

1 rulings, which demands that state-court decisions be given the benefit of the doubt")
2 (internal quotation marks and citations omitted).

3 "[A] federal court may not second-guess a state court's fact-finding process
4 unless, after review of the state-court record, it determines that the state court was not
5 merely wrong, but actually unreasonable." *Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir.
6 2004), overruled on other grounds by *Murray v. Schriro*, 745 F.3d 984, 999–1000 (9th
7 Cir. 2014); see also *Miller-El*, 537 U.S. at 340 ("[A] decision adjudicated on the merits in
8 a state court and based on a factual determination will not be overturned on factual
9 grounds unless objectively unreasonable in light of the evidence presented in the state-
10 court proceeding, § 2254(d)(2).").

11 Because de novo review is more favorable to the petitioner, federal courts can
12 deny writs of habeas corpus under § 2254 by engaging in de novo review rather than
13 applying the deferential AEDPA standard. *Berghuis v. Thompkins*, 560 U.S. 370, 390
14 (2010).

15 III. DISCUSSION

16 *Ground One* – In Ground One, Battle alleges that his convictions in relation to the
17 GameStop incident are in violation of his constitutional rights because insufficient
18 evidence was presented at trial to convict him beyond reasonable doubt. In support of
19 this claim, he contends that the only evidence supporting the convictions is the
20 testimony of Michelle Tyler, which was unreliable. Battle points to the fact that Tyler
21 initially told the police that she would not be able to identify the robber and that she only
22 saw his mouth and nose. He also notes that, while she identified him from a photo
23 lineup, she also indicated she was not sure he was the culprit.

24 Battle presented his sufficiency of evidence claim to the Nevada Supreme Court
25 in his direct appeal. The court addressed the claim as follows:

26 Battle argues that there was insufficient identification evidence to
27 convict him on the three counts associated with the incident at the
28

1 GameStop because Tyler initially said she could not identify the culprit.
 2 We disagree.

3 There is sufficient evidence for a conviction, when, “after viewing
 4 the evidence in the light most favorable to the prosecution, *any* rational
 5 trier of fact could have found the essential elements of the crime beyond a
 6 reasonable doubt.” *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573
 7 (1992) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). “Where
 8 there is substantial evidence to support the jury’s verdict, it will not be
 9 disturbed on appeal.” *Kazalyn v. State*, 108 Nev. 67, 71, 825 P.2d 578,
 10 581 (1992).

11 We recognize that there are some indications that Tyler’s
 12 identification of Battle was unreliable. See *White v. State*, 112 Nev. 1261,
 13 1265, 926 P.2d 291, 294 (1996) (Rose, J., dissenting) (recognizing that
 14 identification reliability issues may arise under stressful circumstances,
 15 when cross-race identifications occur, and when time passes between an
 16 event and an identification); see also *Neil v. Biggers*, 409 U.S. 188, 199–
 17 200 (1972) (noting that identifications may be inaccurate when the
 18 eyewitness does not have a good opportunity to “view the criminal at the
 19 time of the crime,” and an eyewitness is uncertain about identification
 20 soon after an event). Tyler was subject to a stressful event, only saw the
 21 culprit’s nose, mouth, and facial hair, gave conflicting testimony regarding
 22 the facial hair, and stated that she could not identify the culprit
 23 immediately after the event. Furthermore, cross-racial identification
 24 concerns are implicated here, and, when Tyler identified Battle in the
 25 photo lineup a few days after the robbery, she could not identify him with
 26 100 percent certainty.

27 However, the jury was specifically instructed on many of these
 28 identification issues. See *McConnell v. State*, 120 Nev. 1043, 1062, 102
 P.3d 606, 619 (2004) (“We presume that juries follow the instructions they
 1 are given....”). In closing arguments, Battle stressed the importance of the
 2 jury instruction, explaining why Tyler may have misidentified Battle.
 3 Despite these issues, the jury appears to have found Tyler credible. See
 4 *McNair*, 108 Nev. at 56, 825 P.2d at 573 (“[I]t is the jury’s function ... to
 5 assess the weight of the evidence and determine the credibility of
 6 witnesses.”). Furthermore, the jury was shown surveillance videos and
 7 pictures of the culprit from the GameStop incident. In closing arguments,
 8 the State “implore[d the jury] to look at the similarities in the facial
 9 features” between a picture of the culprit at GameStop and Battle. The
 10 State noted that the nose, lips, chin and facial fair looked the same.

11 Additionally, circumstantial evidence was presented that implicates
 12 Battle in the crime. The GameStop robbery occurred within five days of
 13 the incidents at Jack in the Box and 7-Eleven. The clothing that Battle
 14 was wearing when he was arrested at Jack in the Box was similar to what
 15 the culprit at GameStop wore, and the gun found on Battle was similar to
 16 the weapon wielded at GameStop.

17 Thus, we choose not to reweigh the jury’s credibility determination,
 18 and, beyond Tyler’s identification, there was direct and circumstantial
 19 evidence that Battle was the culprit of the GameStop crime. For these
 20 reasons, we conclude that “*any* rational trier of fact could have found the

1 essential elements of the crime beyond a reasonable doubt.” *McNair*, 108
2 Nev. at 56, 825 P.2d at 573 (internal quotation marks omitted).

2 ECF No. 16-6 at 3-5 (footnote omitted).

3 The Nevada Supreme Court correctly identified the “rational factfinder” standard
4 established in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), as the federal law
5 standard to test whether sufficient evidence supports a state conviction. See *Mikes v.*
6 *Borg*, 947 F.2d 353, 356 (9th Cir. 1991). Under that standard, the court inquires as to
7 “whether, after viewing the evidence in the light most favorable to the prosecution, any
8 rational trier of fact could have found the essential elements of the crime beyond a
9 reasonable doubt.” *Jackson*, 443 U.S. at 319 (citation omitted). And because this court
10 must review the Nevada Supreme Court’s sufficiency of evidence determination under
11 AEDPA, “there is a double dose of deference that can rarely be surmounted.” *Boyer v.*
12 *Belleque*, 659 F.3d 957, 964 (9th Cir. 2011). That means that even if this court “think[s]
13 the state court made a mistake,” the petitioner is not entitled to habeas relief unless the
14 state court’s application of the *Jackson* standard was “objectively unreasonable.” *Id.*

15 There is no reasonable dispute that the State presented sufficient evidence at
16 trial to establish all the elements of the crimes arising from the GameStop incident. The
17 only question is one of identification. Beyond evidence discussed by the Nevada
18 Supreme Court, additional evidence supports the jury’s finding that Battle was the
19 culprit. The jury was able to compare video and still shots of Battle taken from
20 surveillance cameras at the GameStop with those from a body camera worn by the
21 officer who arrested him at the Jack in the Box three days later. ECF No. 14-2 at 144-
22 51; ECF No. 14-4 at 53-55. The record before this court suggests that this photographic
23 evidence was sufficiently clear to discern details of Battle’s facial features. ECF No. 15-
24 4 at 47. In addition, Battle was apparently wearing “oversized sunglasses” on both
25 occasions. *Id.* The evidence presented at trial is sufficient for this court to conclude that
26 the Nevada Supreme Court’s decision to deny relief was not “objectively unreasonable”
27 under the *Jackson* standard.

1 Ground One is denied.

2 *Ground Two* – In Ground Two, Battle alleges his convictions are in violation of his
3 constitutional rights because the trial court committed structural error by refusing to
4 have a hearing to determine the racial composition of the jury panel and how the jury
5 commissioner chose the panel. He alleges that African Americans were
6 underrepresented on the panel in his case. He further alleges that the trial court erred
7 by relying on a hearing in another case.

8 Battle presented this claim to the Nevada Supreme Court in his direct appeal.
9 The court addressed the claim as follows:

10 Battle argues that his venire was not composed of a fair
11 crosssection of Clark County because African Americans were
12 underrepresented. Further, he contends that the district court erred by not
conducting a hearing to determine whether there were 2 or 4 African
Americans on the 60–person venire. We disagree.

13 “[I]t is settled that a grand jury must be drawn from a cross-section
14 of the community, and there must be no systematic and purposeful
exclusion of an identifiable class of persons.” *Adler v. State*, 95 Nev. 339,
347, 594 P.2d 725, 731 (1979). “[A] prima facie violation of the fair-cross-
15 section requirements” is demonstrated by showing

16 (1) that the group alleged to be excluded is a “distinctive” group
17 in the community; (2) that the representation of this group in
venues from which juries are selected is not fair and reasonable
in relation to the number of such persons in the community; and
18 (3) that this underrepresentation is due to systematic exclusion
of the group in the jury-selection process.

19 *Williams v. State*, 121 Nev. 934, 940, 125 P.3d 627, 631 (2005) (internal
20 quotation marks and emphasis omitted).

21 Regardless of whether distinctive groups were underrepresented
22 on the jury, Battle must also demonstrate a systematic exclusion. *Id.* “[A]s
23 long as the jury selection process is designed to select jurors from a fair
cross section of the community, then random variations that produce
24 venires without a specific class of persons or with an abundance of that
class are permissible.” *Id.*

25 The district court provided the parties with a transcript from a
26 hearing in a different case, where the jury commissioner testified about the
jury selection process used in Clark County. We conclude that the process
27 explained by the jury commissioner provides no opportunity for systematic
exclusion of specific races.² Accordingly, because Battle failed to provide

any competing evidence in the record, he has failed to make a *prima facie* showing under the third prong of *Williams*.

Furthermore, Battle was not entitled to a hearing as to whether there were two or four African Americans on the venire pursuant to *Afzali v. State*, 130 Nev., Adv. Op. 34, 326 P.3d 1 (2014). Battle was allowed to and did challenge the composition of the venire. Unlike *Afzali*, where the composition of a grand jury venire was a secret, this petit venire appeared before the district court and Battle. Therefore, information about the racial composition of the venire was readily available to all the parties in the courtroom. Additionally, after looking at the venire, the district court determined on the record that there were four African Americans. This situation is unlike *Afzali*, because Battle was not “without access to information about the racial composition of the [venire] that [convicted] him.” *Id.* at 3. Thus, we conclude that Battle’s fair cross-section argument is without merit.

² Battle also incorrectly argues that pursuant to *Williams v State*, 121 Nev. 934, 942 n.18, 125 P. 3d 627, 632 n.18 (2005), a jury pool must be drawn from at least three sources. In *Williams*, this court referenced a report prepared by the Nevada Jury Improvement Commission in which it “recommended that at least three source lists be used to constitute jury pools.” *Id.* This court has never created a brightline rule requiring that a jury pool be drawn from three sources.

ECF No. 16-6 at 5-7.

The three-part test applied by the Nevada Supreme Court was taken from *Duren v. Missouri*, 439 U.S. 357 (1979), and constitutes the correct federal law standard to address Battle’s federal law claim. See *Duren*, 439 U.S. at 364. While the Nevada Supreme Court focused on the third prong of the *Duren* test, Battle failed to satisfy the second prong as well. There are several tests for measuring the degree of underrepresentation and no particular method is constitutionally mandated, see *Berghuis v. Smith*, 559 U.S. 314, 329–30 (2010), but Battle provided information only about his particular venire. That is insufficient. See *Thomas v. Borg*, 159 F.3d 1147, 1150 (9th Cir. 1998) (holding that petitioner’s observations that there were no black jurors on the panel from which his jury was chosen did not satisfy second *Duren* prong, because his panel represented only a small portion of venires); *United States v. Miller*, 771 F.2d 1219, 1228 (9th Cir.1985) (“[A] violation of the fair cross-section requirement cannot be premised upon proof of underrepresentation in a single jury.”).

With respect to the third prong, Battle is required to show that the underrepresentation of African Americans was “*inherent* in the particular jury-selection process.” *Randolph v. People of the State of Cal.*, 380 F.3d 1133, 1142 (9th Cir. 2004) (quoting *Duren*, 439 U.S. at 366 (emphasis added by *Randolph* court)). The Nevada Supreme Court correctly concluded that merely citing to the Nevada Jury Improvement Commission’s recommendation was not adequate to meet the requirement. In addition, there is no federal law requirement that the trial court hold a hearing where the defendant has failed to make a *prima facie* case under *Duren*. See *Miller*, 771 F.2d at 1228-29.

Therefore, Battle is not entitled to relief on this claim because the state court’s adjudication of the claim was based on a reasonable determination of the facts and was not contrary to, or an unreasonable application of, clearly established federal law.

Ground Two is denied.

Ground Three – In Ground Three, Battle alleges that he was deprived of his constitutional right to effective assistance of counsel at trial. Battle presented his ineffective assistance of counsel (IAC) claims to the Nevada Court of Appeals in his state post-conviction proceeding. The court correctly identified the federal law standard governing IAC claims:

To prove ineffective assistance of counsel, a petitioner must demonstrate counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability, but for counsel's errors, the outcome of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*). Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 697.

ECF No. 17-10 at 2.

Battle claims ineffective assistance due to counsel’s alleged failure to move to suppress or object to evidence obtained by Officer Corales, the officer who arrested him at the Jack in the Box after finding a concealed pistol in Battle’s waistband. Battle

1 contends that Corales lacked a reasonable suspicion to justify his initial stop and lacked
2 probable cause for the subsequent search and arrest. Based on that, he argues that
3 counsel had grounds to move to suppress Corales's testimony about the pat-down
4 search, the items seized by Corales, and the video captured by Corales's body camera.

5 The Nevada Court of appeals addressed this IAC claim as follows:

6 Battle argued his counsel was ineffective for failing to file a motion
7 to suppress evidence obtained as a result of a pat-down search. Battle
8 asserted the police officer did not have a reasonable suspicion to justify
the pat-down search. Battle failed to demonstrate his counsel's
9 performance was deficient or resulting prejudice. During the trial, counsel
10 explained to the trial court that she had not been able to file a motion to
suppress evidence because she had only viewed the pertinent video
recording depicting the pat-down search shortly before trial. Counsel
11 explained the investigation into the facts of this case was limited as Battle
had invoked his speedy trial rights, and as a result, she had not been able
12 to pursue a motion to suppress evidence ahead of trial. Counsel therefore
requested the district court to instruct the jury concerning the
13 constitutionality of the pat-down search. The district court recognized the
14 limitations imposed upon the defense given Battle's decision to invoke his
speedy trial rights, but declined to utilize counsel's proposed instruction.
Given the record in this matter and Battle's request for a speedy trial, we
conclude Battle did not demonstrate counsel's performance fell below an
objectively reasonable standard.

15 In addition, the facts in the record demonstrated the totality of the
16 circumstances justified the pat-down search. See *Cortes v. State*, 127
17 Nev. 505, 511, 260 P.3d 184, 189 (2011). The evidence produced at trial
18 demonstrated a person had frightened workers at a Jack in the Box
restaurant and a worker called the police. When an officer arrived in the
19 restaurant, he observed that Battle was wearing a hooded sweatshirt with
the hood covering his head, dark sunglasses at night, and gloves. The
officer attempted to talk with Battle, but Battle walked away from the
20 officer and out of the restaurant at a brisk pace. The officer followed Battle
and ordered Battle to stop and to raise his hands. Battle initially raised his
21 hands, but soon lowered them and reached towards his pocket. The
officer again commanded Battle to raise his hands and Battle complied.
The officer testified that for safety reasons, he placed Battle in handcuffs
22 and conducted a pat-down of Battle. The officer testified he discovered a
pistol in Battle's front pocket. Battle's dress, his refusal to talk with the
23 officer in the restaurant, and his reach towards a pocket despite the
command to raise his hands demonstrated a reasonable officer confronted
24 with this situation could reasonably suspect that Battle was armed and
that a pat-down was necessary for safety reasons. See *id.* Accordingly,
25 Battle failed to demonstrate a reasonable probability of a different
outcome had counsel moved to suppress the evidence obtained following
the pat-down search. Therefore, we conclude the district court did not err
by denying this claim.

1 ECF No. 17-10 at 2-4.

2 Reviewed under § 2254(d), the state court's adjudication of the claim did not
3 "result[] in a decision that was contrary to, or involve[] an unreasonable application of,
4 clearly established Federal law, as determined by the Supreme Court of the United
5 States," nor did it "result[] in a decision that was based on an unreasonable
6 determination of the facts in light of the evidence presented in the State court
7 proceeding."

8 Battle contends a motion to suppress would have been successful because his
9 initial detention was not justified under *Terry v. Ohio*, 392 U.S. 1 (1968). Under *Terry*, an
10 investigative stop is only permissible where "the officer has a reasonable suspicion
11 supported by articulable facts that criminal activity 'may be afoot.'" *United States v.*
12 *Sokolow*, 490 U.S. 1, 7 (1989) (citing *Terry*, 392 U.S. at 30). Although reasonable
13 suspicion does not demand as strong a showing as probable cause and requires less
14 than a preponderance of the evidence, it nonetheless requires at least a minimal level of
15 objective justification for making an investigatory stop. *Illinois v. Wardlow*, 528 U.S. 119,
16 123 (2000); *see also United States v. Cortez*, 449 U.S. 411, 417 (1981) ("An
17 investigatory stop must be justified by some objective manifestation that the person
18 stopped is, or is about to be, engaged in criminal activity."). "The standard takes into
19 account the totality of the circumstances—the whole picture." *Prado Navarette v.*
20 *California*, 572 U.S. 393, 397 (2014). Thus, facts that alone may seem innocent can
21 create a reasonable suspicion of criminality when viewed in a larger context. *See, e.g.,*
22 *United States v. Franco-Munoz*, 952 F.2d 1055, 1057 (9th Cir.1991) ("[T]he facts used
23 to establish 'reasonable suspicion' need not be inconsistent with innocence.").

24 The facts found by the Nevada Court of Appeals are supported in the record by
25 Corales's testimony and the testimony of Daniel Peralta, the supervisor on duty at the
26 Jack in the Box. ECF No. 14-4 at 8-22, 43-66. An additional fact not mentioned in the
27 state court's decision was that Corales had been advised that Battle had been in the
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1 Jack in the Box for “several hours” dressed as described in the decision. *Id.* at 44.³
 2 Although viewed individually the factors relied upon by Corales might appear innocent,
 3 taken together, the circumstances supported a reasonable suspicion that criminal
 4 activity was afoot. The state court’s determination that the investigative stop was
 5 warranted was not unreasonable.

6 Even so, “[a] lawful frisk does not always flow from a justified stop.” *United States*
 7 *v. Thomas*, 863 F.2d 622, 628 (9th Cir. 1988). Rather, “[e]ach element, the stop and the
 8 frisk, must be analyzed separately; the reasonableness of each must be independently
 9 determined.” *Id.*; see also *Terry*, 392 U.S. at 22–23. The standard for justifying a frisk is
 10 whether a reasonably prudent person in the circumstances would be warranted in the
 11 belief that his or her safety or that of others was in danger. *Id.*, see also *Terry*, 392 U.S.
 12 at 27. The Nevada Court of Appeals reasonably applied federal law on this issue as
 13 well. Battle’s refusal to talk with Corales and his reach towards a pocket after first
 14 complying with Corales’s command to raise his hands were sufficient grounds for
 15 Corales to conduct the pat-down search. See *United States v. Burkett*, 612 F.3d 1103,
 16 1107 (9th Cir. 2010) (frisk justified based on “evasive and deceptive responses” to an
 17 officer’s questions and unnatural hand postures that suggest an effort to conceal a
 18 firearm).

19 Though not specifically addressed by the Nevada Court of Appeals, Corales also
 20 had probable cause to arrest Battle. Corales testified at trial that, upon finding the gun
 21 concealed in Battle’s waistband, he conducted a records check and determined that
 22 Battle did not have a permit to carry a concealed weapon. ECF No. 14-4 at 53. At that
 23 point Corales was permitted to seize as evidence all the items in Battle’s possession.
 24 See *United States v. Robinson*, 414 U.S. 218, 230-34 (1973). As for counsel’s alleged
 25 failure to seek suppression of the body camera video, Battle fails to identify the grounds

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 27 ³ In addition, Peralta testified that Battle did not place an order during the entire time he was in the
 restaurant. *Id.* at 14. It is not clear, however, that that fact was communicated to Corales.
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1 upon which counsel could have successfully argued for its exclusion. Given that the
 2 recording took place in public location where Battle had no reasonable expectation of
 3 privacy, his rights under the Fourth Amendment were not implicated. See *United States*
 4 *v. Jones*, 565 U.S. 400, 411 (2012).

5 Because he has not established a reasonable probability that counsel could have
 6 successfully excluded the evidence obtained by Officer Corales, the court denies relief
 7 on his claim that counsel was ineffective in that regard.

8 Battle also alleges in Ground Three that counsel was ineffective by not moving to
 9 suppress allegedly involuntary statements he made without the benefit of *Miranda*⁴
 10 warnings. The Nevada Court of Appeals addressed this IAC claim as follows:

11 Battle claimed his trial counsel was ineffective for failing to move to
 12 suppress his statements due to a violation of his *Miranda* rights. Battle
 13 failed to demonstrate his counsel's performance was deficient or resulting
 14 prejudice. Battle appeared to assert counsel should have sought
 15 suppression of his statement to the officer following the discovery of the
 16 firearm where he stated it was legal for him to carry a concealed weapon.
 17 The record demonstrated Battle made that statement directly after the
 18 officer discovered the firearm and did not make the statement under
 19 questioning by the officer. Considering the circumstances in which Battle
 20 made the challenged statement, he failed to demonstrate he was
 21 subjected to a custodial interrogation, and therefore, his statements were
 22 properly admitted at trial. See *Rosky v. State*, 121 Nev. 184, 191-92, 111
 23 P.3d 690, 695-96 (2005). Accordingly, Battle failed to demonstrate
 24 reasonable counsel would have moved to suppress this statement or a
 25 reasonable probability of a different outcome had counsel done so.
 26 Therefore, we conclude the district court did not err by denying this claim.

27 ECF No. 17-10 at 4 (footnotes omitted).

28 This decision is also entitled to deference under § 2254(d). Moreover, Battle
 2 cannot show *Strickland* prejudice because his statements were unnecessary to
 3 establish his guilt. The State presented sufficient evidence to establish beyond a
 4 reasonable doubt that Battle was guilty of carrying a concealed firearm without Battle's
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29 ⁴ *Miranda v. Arizona*, 384 U.S. 436 (1966).

1 statements. Thus, he cannot show a reasonable probability of a different outcome even
 2 if the statements had been suppressed.

3 Ground Three is denied.

4 *Ground Four* – In Ground Four, Battle alleges he was deprived of his
 5 constitutional right to effective assistance of counsel on direct appeal because counsel
 6 failed to challenge the first degree kidnapping conviction by arguing that movement of
 7 the victim was incidental to the robbery and did not substantially increase the risk of
 8 harm to the victim. To sustain convictions for both robbery and kidnapping arising from
 9 the same course of conduct, under Nevada law, any movement or restraint must either
 10 “stand alone with independent significance from the act of robbery itself, create a risk of
 11 danger to the victim substantially exceeding that necessarily present in the crime of
 12 robbery, or involve movement, seizure or restraint substantially in excess of that
 13 necessary to its completion.” *Mendoza v. State*, 130 P.3d 176, 181 (Nev. 2006)

14 The Nevada Court of appeals addressed this IAC claim as follows:

15 Battle argued his appellate counsel was ineffective. To prove
 16 ineffective assistance of appellate counsel, a petitioner must demonstrate
 17 that counsel's performance was deficient in that it fell below an objective
 18 standard of reasonableness, and resulting prejudice such that the omitted
 19 issue would have had a reasonable probability of success on appeal.
Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). Both
 20 components of the inquiry must be shown, *Strickland*, 466 U.S. at 697.
 Appellate counsel is not required to raise every non-frivolous issue on
 appeal. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Rather, appellate
 counsel will be most effective when every conceivable issue is not raised
 on appeal. *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

21 Battle claimed his appellate counsel was ineffective for failing to
 22 argue the kidnapping conviction should be dismissed because it was
 23 incidental to the robbery. Battle failed to demonstrate his counsel's
 24 performance was deficient or resulting prejudice. The record reveals that
 25 Battle filed letters written by his appellate counsel in which counsel
 26 acknowledged Battle wished for him to raise a challenge to the kidnapping
 conviction on appeal, but counsel informed Battle he believed that issue
 did not have merit and he would not pursue meritless claims on appeal.
 Tactical decisions such as this “are virtually unchallengeable absent
 extraordinary circumstances,” *Ford*, 105 Nev. at 853, 784 P.2d at 953,
 which Battle did not demonstrate.

1 In addition, Battle did not demonstrate a reasonable probability of a
 2 different outcome had counsel argued the kidnapping charge was
 3 incidental to the robbery on direct appeal. The evidence produced at trial
 4 demonstrated Battle robbed a game store employee at gunpoint. After
 5 obtaining the store's money, Battle ordered the employee to the back of
 6 the store, zip-tied her hands to a bathroom stall, and left her alone in the
 7 store bathroom. The movement to a secluded portion of the store and the
 8 restraint of the victim were not necessary to complete the robbery and
 9 substantially increased risk of danger to the victim. See *Mendoza v. State*,
 10 122 Nev. 267, 275, 130 P.3d 176, 181 (2006). Therefore, we conclude the
 11 district court did not err by denying this claim.
 12

13 ECF No. 17-10 at 5-6.

14 The state court correctly identified the federal law standard governing appellate
 15 IAC claims. See *Smith v. Murray*, 477 U.S. 527, 535–536 (1986) (applying *Strickland* to
 16 claim of attorney error on appeal). In addition, the court's determination of the facts was
 17 reasonable in light of evidence presented at Battle's trial (see testimony of Michelle
 18 Tyler and Eric Trevizo, ECF No. 14-2 at 130-199), as was its conclusion that the facts
 19 established a kidnapping independent of the robbery under Nevada law. Thus, the state
 20 court reasonably determined that counsel's failure to challenge the kidnapping
 21 conviction did not amount to ineffective assistance of counsel.

22 Having concluded the state court adjudication of the claim is entitled to deference
 23 under § 2254(d), the court denies Ground Four.

24 IV. CONCLUSION

25 For the reasons set forth above, Battle's petition for habeas relief will be denied.

26 *Certificate of Appealability*

27 This is a final order adverse to the petitioner. As such, Rule 11 of the Rules
 28 Governing Section 2254 Cases requires this court to issue or deny a certificate of
 appealability (COA). Accordingly, the court has *sua sponte* evaluated its adjudication of
 this case to determine whether to issue a COA. See 28 U.S.C. § 2253(c); *Turner v.*
Calderon, 281 F.3d 851, 864-65 (9th Cir. 2002).

29 Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner
 30 "has made a substantial showing of the denial of a constitutional right." With respect to
 31

1 claims rejected on the merits, a petitioner "must demonstrate that reasonable jurists
2 would find the district court's assessment of the constitutional claims debatable or
3 wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463
4 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a COA will issue only if reasonable
5 jurists could debate (1) whether the petition states a valid claim of the denial of a
6 constitutional right and (2) whether the court's procedural ruling was correct. *Id.*

7 Having reviewed its determinations and rulings in adjudicating petitioner's
8 petition, the court declines to issue a certificate of appealability for its resolution of any
9 procedural issues or any of petitioner's habeas claims.

10 **IT IS THEREFORE ORDERED** that that petitioner's petition for writ of habeas
11 corpus (ECF No. 7) is DENIED. The Clerk shall enter judgment accordingly and
12 administratively close this case.

13 **IT IS FURTHER ORDERED** that a certificate of appealability is denied.

14 DATED THIS 21 day of May, 2020.

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UNITED STATES DISTRICT JUDGE

